

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 9962 of 2006

with

CRIMINAL MISC.APPLICATION No. 9963 of 2006

HONOURABLE MR.JUSTICE KS JHAVERI :

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RATILAL PRABHATBHAI THAKORE - Applicant(s)
Versus
KABHAI JIVABHAI THAKORE & 5 - Respondent(s)
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Appearance :

MR NS DESAI for Applicant(s) : 1,
MR MA BUKHARI for Respondent(s) : 1 - 5.
PUBLIC PROSECUTOR for Respondent(s) : 6,
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CORAM : HONOURABLE MR.JUSTICE KS JHAVERI

Date : 09/03/2007

ORAL JUDGMENT

1. The petitioners in both the above petitions are common. In both the petitions, the petitioner prays to cancel the bail granted to the respondents-original accused.

2. So far as Criminal Misc. Application No.9962 of 2006 is concerned, the facts are as under;

Respondent nos. 1 to 5 were arrested in connection with C.R. No. I - 74 of 2006 registered with Balasinor Police Station for the

alleged commission of offences punishable under sections 143, 144, 147, 307 and 323 of Indian Penal Code. The accused were arrested on 28.7.2006 and they were produced before the Judicial Magistrate, First Class, Balasinor. They had moved an application before the said Court on 31.7.2006, which came to be rejected. Thereafter the respondent nos.1 to 5 moved Criminal Misc. Application No.359 of 2006 for regular bail under section 439 of Code of Criminal Procedure before the Sessions Court, Kheda at Nadiad. The Additional Sessions Judge, Fast Track Court No.9, Kheda at Nadiad by order dated 14.8.2006 granted bail to the respondent nos.1 to 5, which is challenged in this petition.

3. So far as Criminal Misc. Application No. 9963 of 2006 is concerned, the facts are as under;

Respondent no.1- original accused had, apprehending his arrest in connection with C.R. No.I 74/2006 registered with Balasinor Police Station for the alleged commission of offences punishable under sections 143, 144, 147,307 and 323 of IPC, moved an application before the Sessions Court, which came to be granted. In pursuance of the same, the respondent no.1 had moved application for regular bail being Criminal Misc. Application No.363 of 2006 before Additional Sessions Judge, Fast Track CourtNo.9, Kheda at Nadiad, which came to be granted by order dated 14.8.2006 and enlarged the respondent no.1 on bail. The petitioner has, therefore, prayed to quash the said order.

4. Mr. Desai, learned Advocate for the petitioner submitted that the Sessions Court ought not to have granted bail to the respondents-accused. He submitted that looking to the gravity of the offence the accused do not deserve bail. He further submitted that before granting bail the original accused were not in judicial custody. According to him, merely because of grant of anticipatory bail, they cannot be considered to be under judicial custody. He has also stated that there is breach of condition of the bail order and, therefore, the bail requires to be cancelled.

5. Learned Advocate appearing for the respondents submitted that the petitioner has not made out any case for quashing the order of bail, there are no breach of conditions, and that the Sessions Court has rightly granted bail to the original accused. Hence, no interference is required by this Court in these applications.

6. As far as Criminal Misc. Application No.9962 of 2006 is concerned, respondent nos.1 to 5 were arrested by the police on 28.7.2006 and their bail application was rejected by the learned J.M.F.C., Balasinor. It is, thereafter, they had moved regular bail application before the Sessions Court, which came to be granted. Therefore, admittedly, they were under custody when they were granted bail. So far as Criminal Misc. Application No.9963 of 2006 is

concerned, the respondent-accused was granted anticipatory bail on condition that the accused shall apply for regular bail within 15 days. Thereafter, the accused had filed regular bail application, which came to be granted. Therefore, the contention of the petitioner that since the respondent no.1 was not in custody when the regular bail was granted to him is misconceived and cannot be accepted. It is well settled law that a person is not only “in custody” when police arrests him or produces him before Magistrate for remand or other custody, but person who surrenders before Court and submits to its directions is also “in custody” within the meaning of Section 439 of CrPC.

7. Learned Advocate for the petitioner has relied upon a decision in the case of *Adri Dharan Das Vs. State of West Bengal*, reported in 2005 SAR (Criminal) 213 wherein it is held that for making an application in terms of section 439, a person has to be in custody. In that case the Apex Court has merely distinguished the scope of Sections 438 and 439 of Criminal Procedure Code and the same will not be applicable to the facts of the present case.

7.1 Learned Advocate has further relied upon a decision in the case of *Sunita Devi Vs. State of Bihar and Anr*, reported in 2005 SAR (Criminal) 108 wherein, it is held that Section 439 comes into operation only when a person is in custody before the Court. In the said decision, it is also held that it is only after the accused

surrendered to custody, an application under section 439 can be made. In the present case, the accused were arrested and only thereafter, the application was moved. Therefore, no assistance can be taken from this decision.

7.2 Learned Advocate has also relied upon a decision in the case of Nirmal Jeet Kaur Vs. State of Madhya Pradesh, reported in 2004 SAR (Criminal) 815 wherein also, it is held that no question of bail is there unless a person is arrested in connection with a non-bailable offence by police. On the facts of the present case, this decision also will be of no assistance to the petitioner.

8. The fact remains that the respondents-accused were in fact arrested and thereafter, they had moved application for regular bail. Therefore, it cannot be said that the accused were not in judicial custody and that they cannot be granted regular bail. The contention raised by the petitioner, therefore, cannot be accepted.

9. Though a contention has been raised that there are breach of bail conditions, learned Advocate for the petitioner has failed to point out any such alleged breaches. Even otherwise, it is stated that the petitioner has moved an application before the Sessions Court pointing out such alleged breaches. In that view of the matter, it will be open to the petitioner to move the Sessions Court to hear the said application and it would not be appropriate for

this Court to go into such question at this stage, when the application before Sessions Court is pending.

10. In the premises aforesaid, I do not find any merits in these petitions. The petitions are, therefore, rejected. Rule is discharged.

[K.S. JHAVERI, J.]

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